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79-1087

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-_____

LEEWARD PETROLEUM, LTD.,
A Bermuda Corporation,
Petitioner

v.

MENE GRANDE OIL COMPANY,
A Delaware Corporation, and
GULF OIL CORPORATION
A Pennsylvania Corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Third Circuit Court of Appeals' dismissal of the petitioner's appeal from the May 15, 1979 order of the United States District Court of Delaware.

OPINIONS ENTERED BELOW

On May 25, 1976, an opinion was entered in this cause by the Delaware District Court denying the defend-

ants, Gulf Oil Corporation's and Mene Grande Oil Company's, 12(b)(6) motion to dismiss. *Leeward Petroleum, Ltd. v. Mene Grande Oil Co.*, 415 F. Supp. 158 (D. Del. 1976). This decision was not appealed to the Court of Appeals for the Third Circuit, and thus is not in issue herein on petitioner's request for certiorari.

On May 15, 1979, an order (Appendix C, *infra* at 24) was entered by the Delaware District Court denying Leeward Petroleum's motion to enjoin the defendants from prosecuting a duplicitous action in Venezuela. This order also granted the defendant's motion to stay the Delaware proceedings and declined a motion for summary judgment as to the antitrust claims of Leeward. After instituting an appeal from the injunctive and stay portions of this order, an order issued in lieu of a formal mandate—to be treated in all respects as a mandate—was rendered by the Court of Appeals for the Third Circuit denying appellate jurisdiction (Appendix G, *infra* at 37). It is the propriety of this order denying appellate jurisdiction, when considered in light of the Delaware District Court's order, that is in issue herein.

JURISDICTION

The dismissal of the appeal by the Court of Appeals for the Third Circuit was rendered on October 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTION PRESENTED

Whether a circuit court of appeals may, in direct derogation of a U.S. statute, summarily dismiss as non-

appealable under § 1292(a) of the Judicial Code an order which, on its face, declines to enjoin duplicitous and concurrent litigation in a foreign forum and which also temporarily stays a first-filed action in a domestic forum.

STATUTE INVOLVED

The relevant portion of the Judiciary Code is as follows:

§ 1292. Interlocutory Decisions.

(a) The Courts of Appeal shall have jurisdiction of appeals from;

(1) Interlocutory Orders of the District Court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands, or the judges thereof, granting, continuing, modifying, *refusing* or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. . . . (Italics added).

STATEMENT OF THE CASE

This case presents a breach of contract action instituted initially in the Delaware District Court by the Plaintiff, Leeward Petroleum, Ltd. (Leeward). The merits of this cause have never been reached, as one of the Defendants, Mene Grande Oil Corporation (Meneg), by filing a declaratory judgment action in Venezuela (currently still pending), forced Leeward into a procedural revolving-door requiring it to prosecute the same cause of action in two forums. Although a detailed analysis of the various

proceedings and motions leading up to the requested writ would be unduly burdensome, it is essential that mention be made here of the various motions pertinent to this petition.

On August 18, 1975, Leeward filed its original complaint in Wilmington, Delaware, against the defendants, Gulf Oil Corporation and Mene Grande Oil Corporation. The defendants countered with a 12(b)(6) motion to dismiss and a motion to dismiss or stay on *forum non conveniens* grounds (Appendix A, *infra* at 18). After an opinion was entered on May 25, 1976, denying Gulf's and Meneg's 12(b)(6) motion, *Leeward Petroleum, Ltd. v. Mene Grande Oil Co.*, 415 F. Supp. 158 (D. Del. 1976), all parties began extensive discovery and numerous depositions were taken in preparation for trial in Delaware. These depositions culminated in the production of hundreds of documents and over 1,000 pages of testimony. Yet, instead of bringing the motions on for hearing or filing papers in support thereof, both Gulf and Meneg chose to utilize the processes of the U.S. Court to their advantage. Pursuant to a meeting with the Delaware District Court on September 6, 1977, after discovery was nearing completion, Gulf and Meneg were advised to file their memorandum in support of their motion to stay and/or dismiss. Not until November 17, 1978, some two and one-half years after an opinion was rendered in the 12(b)(6) hearing, were the supporting papers finally filed by respondents.

Almost simultaneously, Meneg filed a declaratory judgment action in Venezuela on the contract issues before the Delaware District Court. This was almost three years after the filing of Leeward's complaint in Delaware. The

Venezuelan action sought a declaratory judgment as to two "threshold issues" which were being prepared for trial and which were embodied in Count I of Leeward's Complaint filed earlier in Delaware. These threshold issues dealt with whether or not Venezuelan governmental approval was required *as a matter of Venezuelan law* to complete the contract which was made the underlying basis of this suit. If approval was required, a second question posed to the Venezuelan court was the factual one of whether or not their governmental authorities had disapproved of the transaction. Both of these matters were subjects of the prior Delaware action and were near to resolution and/or were simple matters of proof of foreign law. Meanwhile, petitioner, being placed in the type of quandry Judge Friendly recognized in *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970),[1] attempted to fight the Venezuelan action by pleas of lis pendens. The Venezuelan action is presently on appeal in their courts.

Due to the duplication of costs and effort in prosecuting a cause of action in two different fora, and mindful of its right to choose its own forum for the trial of its lawsuit, Leeward filed a motion to enjoin the Venezuelan Declaratory Judgment Action (Appendix B, *infra* at 22). Finally, in an order dated May 15, 1979 (Appendix C,

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1. Judge Friendly noted:
   When they see a storm brewing in the first court, they may try to weigh anchor and set sail for the hopefully more favorable waters of another district. . . . [The Plaintiff in the first suit] is then put to the Hobson's choice of either going along with this ploy by agreeing to dismissal of the first action if the Plaintiff [in the second suit] is willing, or having to defend two lawsuits at the same. If he makes the latter election, as is his right, not only the parties but the courts pay a heavy price.
   422 F.2d 1197, 1203.

infra at 24), Leeward's motion to enjoin was denied without prejudice and Meneg's motion to stay the Delaware proceeding was granted. Thereafter, Leeward moved pursuant to § 1292(b) of the Judiciary Code for certification to the court of appeals of that portion of the district court's order relating to the stay of the Delaware proceedings. This motion was denied in oral hearing on the district court judge's assumption that certification at that point would delay Leeward's *right* of appeal pursuant to § 1292(a)(1) on the denial of the injunction by the Delaware court (Appendix D, *infra* at 27).

A timely appeal ensued (Appendix E, *infra* at 32), which was countered by Meneg's and Gulf's motion to dismiss on the grounds that the court of appeals lacked subject-matter jurisdiction (Appendix F, *infra* at 34). In an order dated October 15, 1979, the Court of Appeals for the Third Circuit granted Meneg's and Gulf's motion to dismiss on the grounds that jurisdiction was lacking (Appendix G, *infra* at 37). Because the court of appeals' dismissal for lack of jurisdiction conflicts with the specific statutory mandate of § 1292(a)(1) of the Judiciary Code and the unanimous case law construing it, petitioner urges this court to issue a Writ of Certiorari and reverse the decision of the court of appeals denying subject-matter jurisdiction.

REASONS FOR GRANTING THE WRIT

1.

In its decree issued below, the Court of Appeals for the Third Circuit dismissed the petitioner's appeal from the district court's order, and therefore foreclosed all review entirely. In so doing, the decision is in conflict with:

(a) The express federal policy of § 1292(a)(1) of the Judiciary Code which gives courts of appeals jurisdiction over "[i]nterlocutory orders of the District Courts of the United States . . . refusing . . . injunctions. . . ." 28 U.S.C. § 1292(a)(1) (1979).

(b) The case law in this Court and the courts of appeal which, consistent with the specific mandate of § 1292(a)(1), has long and unanimously held that the grant or denial of a motion to enjoin duplicitous litigation in a foreign forum is appealable pursuant to § 28 U.S.C. § 1292(a)(1).

(c) Decisions issued by the courts of appeal which have recognized that when duplication of litigation is present, a motion to stay, when countered with a motion to enjoin, should be considered as one appealable venue question pursuant to 28 U.S.C. § 1292(a)(1).

2.

These conflicts pertain to the most important question of the statutory jurisdiction of the courts of appeal under 28 U.S.C. § 1292(a)(1) and require prompt and authoritative resolution by this Court. The dismissal of the petitioner's appeal by the court of appeals does violence to the congressional concern to allow specially excepted appeals from orders other than final judgments when they have a final and irreparable effect on the rights of litigants. It is a serious matter for a court to take the position of refusing all jurisdiction to a litigant with an unadjudicated cause quite within the court's statutory authority. Jurisdiction to litigate is not something to be withheld

or granted by a court at its wish or convenience. There is obviously a growing tendency in the congested courts of appeal to look for excuses to push a case off the docket, and even though sympathy might be had for the difficult situation facing over-worked judges, this is not a permissible course or one fair to litigants.

3.

I. Conflict with the Express Federal Policy of Section 1292(a)(1) of the Judicial Code.

In the federal courts, appeals from interlocutory orders have been prohibited, with certain statutory exceptions, since the initial formulation of the "final judgment rule" in the Judiciary Act of 1789. 1 STAT. 73 (1789). This finality requirement, now embodied in section 1291, evinces a legislative judgment that "[r]estricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 170 (1972). Section 1292(a)(1) of the Judicial Code provides for an exception to the ordinary rule and allows appealability of all orders entered by district courts denying injunctions. 28 U.S.C. § 1292(a)(1) (1979). This section of the Judicial Code was enacted to permit litigants effectively to challenge interlocutory orders of "serious, perhaps irreparable consequence". *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181 (1955). The statute itself is the embodiment of a desire to balance the practicability of savings in time and expense with the need to give proper weight to aggrieved litigants.

On numerous occasions, it has been recognized that the efforts which culminated in the decision to enact § 1292 (a)(1) in its present form were of the legislative variety, as it was Congress which was thought to stand in the best position of weighing the relevant competing interests. Recognizing this fact, this Court has guarded against the expansion *or contraction* of the statute:

> This Court, however, is not authorized to approve or declare judicial modification. It is a responsibility of all courts to see that no unauthorized extension *or reduction* of jurisdiction, direct or indirect, occurs in the federal system. Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money.

Baltimore Contractors, supra, at 181-182 [citation omitted].

The record presented to the court of appeals in no way places in dispute the appealibility of the Delaware District Court ruling. The order provides, on its face, the following:

ORDERED As Follows:

1. The Motion of Leeward to enjoin Meneg from proceeding in the Venezuelan action is denied without prejudice.
2. The Motion of Meneg and Gulf to Stay this action is granted (Appendix C, *infra* at 25).

It seems incongruous that the court of appeals could have found anything in the record which would detract from the appealability of the court's order. Indeed, it was the lower court's presumption of appealability that formed the basis for the denial of the petitioner's request

for certification of the stay, as it assumed that certification would delay an appeal regarding the injunction:

> THE COURT: But to make it formal I now formally rule that the injunction which is requested by the Plaintiff in this case is denied.
>
> The Motion for Certification in my opinion is not warranted by this Court for two reasons, the main one being that I do not think that it is a proper matter to be certified. It is discretionary. I think I exercised my discretion and I don't think it would be looked upon favorably by the Circuit Court of Appeals. The second thing in my mind is that if you, the Plaintiff, decide to take this matter to the Circuit Court of Appeals on the denial by me of the injunctive relief which you request—
>
> MR. VEASEY: That is, the Plaintiff requested.
>
> THE COURT: Yes.—That would mean possible delay by granting the certification. There might be some delay in getting to what I consider to be the issue which you are anxious to have decided, namely, whether or not I should enjoin the Defendant in this case from proceeding in Venezuela. And these are the reasons that I am denying the Motion for Certification.
>
> As far as the injunctive relief and my reasons for acting as I have with respect to these two motions, I think that is pretty well documented in the proceedings before the Court in the Court's statements on May 11, the day of the hearing. Does that cover it?[2]

2. The motion for certification of that portion of the lower court's order dealing with the stay of the Delaware action was denied in an oral hearing on May 15, 1979. The above-quoted excerpt is taken from this oral hearing. It was during this hearing on May 15, 1979, that the district court judge announced his opinion concerning the injunctive and stay motions before the court. The transcript of this hearing is presented to this Court in Appendix D, *infra* at 27, 29-30.

It is ironic that a presumption of appealability below actually had the effect of torpedoing all effective review of an unquestionably appealable order. It is clearly not within the province of the court of appeals to ignore this record, and to invent its own rationale for the disposition of the injunction below.

It is one thing to be reminded that the grant or denial of a temporary injunction lies within the trial court's discretion and that it can be set aside only if an abuse of discretion can be shown. While these statements may have their proper place somewhere down the line in this litigation, it is quite another thing to deny jurisdiction to a litigant altogether. Section 1292(a) establishes the appealability of orders such as that presented herein. Accordingly, the petition should be granted to resolve the conflicts between the federal policy, statutes, and case law underlining the statute and the erroneous decision of the court of appeals below.

II. Conflcts with Decisions of this Court and the Courts of Appeal

In speaking of section 1292(a), it has been stated that the statute must be approached gingerly, "lest a floodgate be opened that brings into the exception many pretrial orders." *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966). Accordingly, this Court and the courts of appeal have grappled with the proper scope of the term "injunction" under the statute. Recognizing that the "literal characterization of an order as an injunction only begins the inquiry into appealability", *Stateside Machinery Co. v. Alperin,* 526 F.2d 480, 482 (3d Cir. 1975), the courts have denied status

under 1292(a)(1) where appropriate. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 481-82 (1978); *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 182-84 (1955); *Morgantown v. Royal Insurance Co.*, 337 U.S. 254, 258 (1949).[3] But whatever interpretational problems this statute has spawned, this Court, and the courts of appeal, have uniformly recognized that orders respecting injunctions against the commencement or prosecution of litigation in other courts are appealable under § 1292(a). *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952), *aff'g*, 189 F.2d 31 (3d Cir. 1951); *Warshawsky & Co. v. Arcata National Corporation*, 552 F.2d 1257, 1258 (7th Cir. 1977); *National Equipment Rental, Ltd. v. Fowler*, 287 F.2d 43, 45 (2d Cir. 1961).[4] Indeed, so obvious was this fact that the court in *Alperin, supra*, noted such cases to be "classic form[s] of injunctive relief [within the meaning of § 1292(a)]."*Alperin, supra*, 526 F.2d at 483. The order issued by the Court of Appeals for the

3. *See, e.g.*, Rogers v. United States Steel Corporation, 541 F.2d 365 (3d Cir. 1976) (denial of class action status held not appealable as an injunction under § 1292(a)(1)); Stateside Machinery Co. v. Alperin, 526 F.2d 480 (3d Cir. 1975) (denial of motion to stay arbitration held not appealable pursuant to § 1292(a)(1)); Cotler v. Inter-County Orthopaedic Association, P.A., 526 F.2d 537, 541 (3d Cir. 1975) (motion to stay held not appealable). *See* Wallace v. Norman Industries, Inc., 467 F.2d 824, 826 (5th Cir. 1972); Ephrian Freightways, Inc. v. Red Ball Motor Freight, Inc., 376 F.2d 40, 41 (10th Cir. 1967).

4. *See, e.g.*, Codex Corp. v. Milgo Electronic Corp., 553 F.2d 735 (1st Cir.), *cert. denied*, 434 U.S. 860 (1977); Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577 (1st Cir. 1969); Maryland v. Atlantic Aviation Corp., 361 F.2d 873 (3d Cir. 1966), *cert. denied*, 385 U.S. 931 (1967); 9 MOORE'S FEDERAL PRACTICE § 110.2[1] at 235 (2d ed. 1975); 16 Wright & Miller, FEDERAL PRACTICE & PROCEDURE: *Jurisdiction* § 3924 at 67 (1st ed. 1973).

Third Circuit stands in stark, solitary conflict with these authorities.

By way of contrast, the courts have distinguished ordinary stays which merely regulate a court's docket from injunctive orders, which temporarily or permanently halt proceedings in other fora. *Compare Landis v. North American Co.*, 299 U.S. 248 (1936).[5] Because such orders were not thought to pose serious, perhaps irreparable consequences to litigants, but were in fact mere instances of docket regulation, injunctive status was denied. But these cases throw no light at all upon why there should have been such judicial abnegation as encountered below, as "mere regulation of the docket" cannot characterize the relief sought by Leeward in the Delaware District Court. Recognizing the difference between mere docket regulation and relief such as that sought by Leeward, this Court has noted that "[t]he point was made in the *Enelow* Case that power to stay mere steps within the framework of the litigation before a court differs as to appealability from an injunction prohibiting proceedings in another court." *Baltimore Contractors, supra*, at 183.[6]

5. In fact, it was the ordinary stay, as opposed to the injunction, that presented problems of construction. *See Baltimore Contractors v. Bodinger*, 348 U.S. 176, 182 (1955), where this Court noted: "The appealability of routine interlocutory injunctive orders raised few questions. There the statute was clear. I was when stays of proceedings, in distinction to injunctions, were appealed that the issue of jurisdiction became sharp." *Id.* [citation omitted].

6. *Enelow v. New York Life Insurance Co.*, 293 U.S. 379 (1935), dealt with the appealability of a stay order pursuant to section 129 of the Judicial Code, which was the predecessor of section 1292(a). Further interpretation of the *Enelow-Ettelsen* rule, which rests on the distinction between "legal" and "equitable" claims, is not in issue herein. *See generally* Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942). The *Enelow* decision did, however, note the

In speaking of section 1292, this Court has said, "[the statute] allows appeals also from certain interlocutory orders, decrees and judgments, . . . [and it] indicate[s] the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties." *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, 545 (1949). The order entered by the Delaware District Court meets these requirements. This much must be conceded, as a refusal to enjoin the Declaratory Judgment Action in Venezuela is not conditional, nor can it be effectively subject to alteration or amendment prior to final judgment in Venezuela.[7] Moreover, although perhaps reviewable after judgment on the merits, reviewability after judgment serves no protection against the relief sought as the duplication of effort and waste of judicial time and litigants' money is precisely the evil the injunctive relief in such circumstances seeks to avoid.[8] Accordingly, the decision of the court of appeals below denying subject-matter jurisdiction directly conflicts with decisions in this Court and in the

distinction between ordinary stays of a court's own proceedings which may issue "to control the progress of the cause" and the power to interfere with proceedings in another court, which should be deemed a "grant or refusal of an injunction within the meaning of § 129 [now § 1292(a)(1)]." 293 U.S. 379, 381-82.

7. Recently this Court has distinguished orders which are subject to alteration prior to final judgment as not appealable as not presenting such "final and irreparable" effect so as to come within an exception to the final judgment rule of section 1291. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). *Compare* 28 U.S.C. § 1291 (1979).

8. *See Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197, 1201 (2d Cir. 1970), where the Court stated that it would be "absurd" under such circumstances to defer determination of the propriety of an order identical to that herein until after judgment. *Compare* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

court of appeals, and a writ should issue to resolve these conflicts.

III. Conflicts with Decisions in the Courts of Appeal Holding that Orders Disposing of a Motion to Stay and a Motion to Enjoin Proceedings in Other Courts are Appealable as One Related Venue Question.

There can be no doubt that where duplication of issues and concurrent litigation are present, a Motion to Stay one action, when combined with a Motion to enjoin another, will form a single, related venue question. The courts of appeal have so recognized this fact, noting that the entire venue question is appealable, the injunction pursuant to § 1292(a), and the stay, where applicable, as ancillary to the grant or denial of the injunction. *Mercury Motor Express, Inc. v. Brinke,* 475 F.2d 1086, 1092 (5th Cir. 1973); *Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197, 1201 (2d Cir. 1970). To ferret out an ordinarily nonappealable portion of a district court's order, while ignoring another appealable aspect presumably to lessen the court's docket load, is a practice destructive to a litigant's right of review and the federal policy underlying section 1292(a). *See Codex Corporation v. Milgo Electronic Corporation,* 553 F.2d 735 (1st Cir. 1977) *cert. denied,* 434 U.S. 860 (1977).

In *Codex,* a motion to enjoin duplicitous litigation and a Motion to Stay were before the Court. The order entered by the District Court was a stay of a later filed declaratory judgment action. No mention of the injunction was made in the order; rather, the Court of Appeals held that the motion to enjoin must be deemed denied by the

stay, *sub silentio*. On such facts, the court held that an appeal would lie *"as [a matter] of right."* Id. at 737 (emphasis added). The only question, according to the Court, was whether the motion to enjoin was somehow dispensed with by the Court. *See, e.g., Carter v. American Telephone & Telegraph Co.*, 365 F.2d 486, 489 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967) (noting that appealability is particularly clear if the district court makes it perfectly clear that the stay was the reason for denying preliminary injunctive relief); 16 WRIGHT & MILLER § 3923 at 66 (1st ed. 1973). "It is the denial of a preliminary injunction, not the validity of the reasons therefore, which triggers the interlocutory appeal as a matter of right under § 1292(a)(1)." *Carter, supra*, at 489. This analysis should have been applied below. Accordingly, a writ should issue to resolve these conflicts in the courts of appeal.

CONCLUSION

In view of the conflict of the dismissal below with the prior and long standing decisions and rule of this court and the various courts of appeals, and particularly in light of the specific mandate of § 1292(a)(1), Petitioners respectfully pray that this Court grant a Writ of Certiorari and reverse the decision of the court below.

Respectfully submitted,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-_____

LEEWARD PETROLEUM, LTD.,
A Bermuda Corporation,
Petitioner

v.

MENE GRANDE OIL COMPANY,
A Delaware Corporation, and
GULF OIL CORPORATION,
A Pennsylvania Corporation,
Respondents

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-245

LEEWARD PETROLEUM, LIMITED,
a Bermuda corporation,
Plaintiff,

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL CORPORATION,
a Pennsylvania corporation,
Defendants.

MOTIONS TO SEVER, FOR PARTIAL SUMMARY JUDGMENT, AND TO DISMISS OR STAY ON GROUNDS OF *FORUM NON CONVENIENS*

Defendants Mene Grande Oil Company ("Meneg") and Gulf Oil Corporation ("Gulf") hereby move as follows:

1. Pursuant to Rule 21, Fed. R. Civ. P., to sever Count VI of the Amended Complaint;

2. Pursuant to Rule 56, Fed. R. Civ. P., for summary judgment dismissing Count VI on the ground that, based upon the pleadings, answers to interrogatories, depositions and affidavits to be filed, there is no material issue of fact as to such Count and that defendants are entitled to judgment as a matter of law; and,

3. To bring on for hearing the motion of Meneg to dismiss, or alternatively to stay, Counts I through V of the Amended Complaint on grounds of *forum non conveniens.*

In support of the foregoing, defendants respectfully represent as follows:

A. On September 19, 1975, defendants moved to dismiss the original complaint for failure to state a claim upon which relief can be granted, pursuant to Rule 12 (b)(6), Fed. R. Civ. P., and Meneg further moved to dismiss or stay this action on grounds of *forum non conveniens.* (Docket No. 5).

B. On November 6, 1976, following the filing of defendants' brief in support of the motion to dismiss under Rule 12(b)(6), plaintiff filed an amended complaint. (Docket No. 18). Defendants again moved to dismiss the amended complaint under Rule 12(b)(6), and Meneg again moved to dismiss or alternatively to stay this action on grounds of *forum non conveniens.* (Docket No. 21). On December 4, 1975, the Court entered an order requiring the Rule 12(b)(6) motion to be briefed and argued, and deferring the briefing and argument on the motion of Meneg to dismiss or alternatively to stay on grounds of *forum non conveniens* pending disposition of the Rule 12(b)(6) motion. (Docket No. 22).

C. On May 25, 1976, The Court rendered an opinion and on July 6, 1976 entered an order denying the Rule 12(b)(6) motion to dismiss. (Docket Nos. 31 and 37, respectively). Thereafter the defendants filed their answer to the amended complaint. (Docket No. 42).

D. In their answer to the amended complaint the defendants asserted, *inter alia,* the defense of *forum non conveniens,* in paragraph 70 as follows:

> "70. The Amended Complaint should be dismissed under the doctrine of *Forum Non Conveniens* and Plaintiff remitted to pursue its available remedies under the laws of and in the Courts of Venezuela on the ground that the alleged transaction and all allegations as set forth in Counts I through V of the Amended Complaint: (a) involve parties and persons situate in Venezuela and crude oil produced and to be sold and purchased in Venezuela; (b) involve alleged obligations arising under and to be interpreted and governed exclusively by the laws of Venezuela; (c) involve alleged claims which are properly determinable exclusively by the Courts of the Republic of Venezuela; and/or (d) involve alleged claims which should, as a matter of comity, be determined by such Courts."

E. Defendants submit that there is no material issue of fact and that they are entitled to judgment as a matter of law on Count VI, in that there is no factual or legal basis for plaintiff's claim based upon an alleged violation of the federal antitrust laws.

F. It is appropriate in this case for the Court to sever and proceed separately with Count VI of the amended complaint and to decide the defendants' motion for summary judgment as to such claim.

G. The remainder of the amended complaint should be dismissed or stayed under the doctrine of *forum non conveniens,* in that such claims are wholly dependent upon issues arising under and required to be interpreted

and governed exclusively by the laws of Venezuela and that such issues are properly determinable by the Courts of the Republic of Venezuela.

Respectfully submitted,

/s/ E. NORMAN VEASEY
E. Norman Veasey

/s/ RICHARD J. ABRAMS
Richard J. Abrams
Richards, Layton & Finger
4072 DuPont Building
Wilmington, Delaware 19899
Attorneys for Defendants
Mene Grande Oil Company
and Gulf Oil Corporation

Dated: September 6, 1977

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 75-245

LEEWARD PETROLEUM, LTD.,
a Bermuda corporation,
Plaintiff

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL COMPANY,
a Pennsylvania corporation,
Defendants

MOTION TO ENJOIN DEFENDANT, MENE GRANDE OIL COMPANY, FROM PROCEEDING IN ACTION SUBSEQUENTLY FILED IN VENEZUELA

Plaintiff, Leeward Petroleum, Ltd., (Leeward) moves this Court for an order enjoining the defendant, Mene Grande Oil Company, (Meneg) from taking any further action or conducting any further proceedings in the declaratory judgment action filed by Meneg in the Judicial Circuit of the Federal District and State of Miranda in the Country of Venezuela, Case No. 8025, filed on or about September 6, 1977. The grounds for this motion are:

1. Both Leeward and Meneg are parties in the action now pending in this Court and have been since August,

1975, or over two years before Meneg filed its Venezuelan action.

2. The factual and legal issues raised in the latter filed action are included within Count I of the present action towards trial of which considerable time, effort and expense have already been made in this action.

3. The said issues can be fully litigated in this forum whereas all of the said issues raised in this action cannot be fully litigated in the foreign forum.

4. The subsequently filed proceedings are vexatious and oppressive.

5. Said subsequent foreign proceedings were filed in derogation of this Court's jurisdiction and seek an ouster thereof.

The factual and legal basis substantiating the grounds set forth above are more fully set out in plaintiff's opening brief, which is being filed concurrently, herewith.

Dated: August 7, 1978

Respectfully submitted,

Connolly, Bove & Lodge

By /s/ THOMAS S. LODGE
Attorneys for Plaintiff
Farmers Bank Building
Wilmington, Delaware 19899

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-245

LEEWARD PETROLEUM, LTD.,
a Bermuda corporation,
Plaintiff,

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL CORPORATION,
a Pennsylvania corporation,
Defendants.

ORDER

THIS 15th day of May, 1979, the parties having brought the following motions before the Court:

(a) The motion of defendants Mene Grande Oil Company ("Meneg") and Gulf Oil Corporation ("Gulf") to stay this action pending final determination of an action commenced by Meneg against plaintiff Leeward Petroleum, Ltd. ("Leeward") now pending in the Second Court of First Instance for Commercial Matters of the Judicial District for the Federal District and the State of Miranda, File No. 4995 (the "Venezuelan Action");

(b) The motion of Leeward to enjoin Meneg from proceeding in the Venezuelan Action; and

(c) The motion of Meneg and Gulf for summary judgment dismissing Count VI of the Amended Complaint;

and such motions having come before the Court for decision on the record herein and the briefs and oral argument of the parties, and the Court having exercised its discretion and having rendered its decision in open Court on May 11, 1979, it is

ORDERED as follows:

1. The Motion of Leeward to enjoin Meneg from proceeding in the Venezuelan Action is denied without prejudice.

2. The Motion of Meneg and Gulf to stay this action is granted. This action and all proceedings herein shall be stayed pending final determination in the Venezuelan Courts of the issues raised by way of Declaratory Judgment in the Venezuelan Action, or until further Order of this Court, on the condition that Gulf consent that, for purposes of the action pending in this Court, it shall be bound by such determination of the Venezuelan Action and that as to Gulf such judgment shall be given such *res judicata* and collateral estoppel effect as shall be applicable to Meneg and Leeward as if Gulf were a party to the Venezuelan Action.

3. The motion of Meneg and Gulf for summary judgment dismissing Count VI is denied without prejudice.

/s/ CALEB M. WRIGHT
Senior Judge

Approved as to form:

/s/ THOMAS S. LODGE
Thomas S. Lodge
Connolly, Bove & Lodge
1800 Farmers Bank Building
Wilmington, DE 19801
Attorney for Plaintiff

/s/ E. NORMAN VEASEY
E. Norman Veasey
Richards, Layton & Finger
4072 DuPont Building
Wilmington, DE 19801
Attorney for Defendants

On behalf of Gulf Oil Corporation I do hereby accept and consent to the terms and conditions of paragraph 2 of this Order and I represent to the Court that Gulf intends and agrees to be bound thereby.

/s/ E. NORMAN VEASEY
E. Norman Veasey
Attorney for Gulf Oil Corporation

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-245

LEEWARD PETROLEUM, Ltd.,
a Bermuda corporation,
Plaintiff,

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL CORPORATION,
a Pennsylvania corporation,
Defendants.

Wilmington, Delaware
May 15, 1979

BEFORE: THE HONORABLE CALEB M. WRIGHT,
Senior, Judge, United States District Court.

APPEARANCES:

CONNOLLY, BOVE & LODGE
By: THOMAS S. LODGE, ESQ.
for the Plaintiff,

RICHARDS, LAYTON & FINGER
By: E. NORMAN VEASEY, ESQ.
for the Defendants.

TRANSCRIPT OF PROCEEDINGS

May 15, 1979
5:05 o'clock p.m.
Judge's Chambers

PRESENT: As noted.

THE COURT: Gentlemen, there are several matters which you have asked me to rule upon. I am sorry that I don't have the time to do this more formally. But would you please state for the record what it is you wish me to rule upon?

MR. VEASEY: Your Honor, I have submitted a form of order to implement the Court's ruling of Friday, May 11. The form of order has been agreed to, I believe, by Mr. Lodge. In addition to that, I believe Mr. Lodge has an application for certification to the Court of Appeals.

We take the view that the order as agreed to by the parties to implement Your Honor's ruling is not appealable under 28 USC, Section 1292 (a)(1), nor should it be certified under 28 USC, Section 1292 (b) for the reason set forth in the letter which I have submitted to Your Honor today.

Therefore, it would be our application that the request for certification be denied. This is a discretionary ruling of Your Honor's. The Order so states. The basis for the ruling is set forth in the record.

THE COURT: Mr. Lodge, do you have anything that you wish to put on the record?

MR. LODGE: Your Honor, of course—

THE COURT: With respect to the certification.

MR. LODGE: With respect to the certification, the application was made on the ground that the granting of the stay in the court pending the determination of the declaratory judgment action in the Venezuelan court, and the denial of the injunction to enjoin defendant from proceeding in the Venezuelan court, are so interwoven that it is Plaintiff's contention that if the matter were certified to the Court of Appeals, that is, the matter of the stay going up with the injunction, which, of course, we take the position, as opposed to Mr. Veasey, that the denial of the injunction is an appealable order under 1292 (a)(1), that it would tie the package up in one bundle as it were and in our opinion materially advance the termination of the litigation, not to have this legal battle being waged on two fronts simultaneously.

THE COURT: Very well. Now, the question of the stay was litigated, and, of course, I did not make any formal ruling when we had our hearing, when was it, last Friday.

MR. VEASEY: Last Friday, May the 11th.

THE COURT: Friday, May the 11th about the motion for the injunctive relief. I thought that the very fact that I stayed this action here indicated that the matter down there should proceed. But to make it formal I now formally rule that the injunction which is requested by the Plaintiff in this case is denied.

The motion for certification in my opinion is not warranted by this Court for two reasons, the main one being

that I do not think that it is a proper matter to be certified. It is discretionary. I think I exercised my discretion and I don't think it would be looked upon favorably by the Circuit Court of Appeals. The second thing in my mind is that if you, the Plaintiff, decide to take this matter to the Circuit Court of Appeals on the denial by me of the injunctive relief which you requested—

MR. VEASEY: That is, the Plaintiff requested.

THE COURT: Yes.—that that would mean possibly delay by granting the certification. There might be some delay in getting to what I consider to be the issue which you are anxious to have decided, namely, whether or not I should enjoin the Defendants in this case from proceeding in Venezuela. And these are the reasons that I am denying the motion for certification.

As far as the injunctive relief and my reasons for acting as I have with respect to these two motions, I think that is pretty well documented in the proceedings before the Court and the Court's statements on May the 11th, the day of the hearing. Does that cover it?

MR. VEASEY: Yes, Your Honor. I would just like to add one thing with respect to the matter of delay. I agree with Your Honor that certification and injunction pending appeal would delay matters.

THE COURT: It might.

MR. VEASEY: It might delay matters.

THE COURT: I don't know that it would, but I can see the possibility that it might delay matters.

MR. VEASEY: It is our view, and I think the record supports it, that the action in Venezuela can go forward,

we're ready to go forward on the merits of that action, and, if the Plaintiff here, Leeward, would cooperate, the matters could go forward on the merits down there expeditiously. We're prepared to move that forward.

THE COURT: Now, off the record a minute.

(A brief discussion was had off the record.)

MR. LODGE: In reply to Mr. Veasey's statement, I would not want any inference to be drawn from the fact that Leeward will not cooperate in the prosecution of the declaratory judgment action in Venezuela—I certainly assume that it will—and that there should be no feeling that there would be any intentional foot dragging in order to try to get the matter determined here in the Court of Appeals before anything further is done in Venezuela.

(The proceedings recessed at 5:20 o'clock p.m.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-245

LEEWARD PETROLEUM LIMITED,
a Bermuda corporation,
Plaintiff,

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL CORPORATION,
a Pennsylvania corporation,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Leeward Petroleum, Ltd., plaintiff above-named, hereby appeals to the United States Court of Appeals for the Third Circuit from paragraph 1 of the Order, entered by the United States District Court for the District of Delaware on May 15, 1979, denying plaintiff's Motion to enjoin the defendant, Mene Grande Oil Company, from proceeding in the Venezuelan Action begun by said defendant against plaintiff; and also from paragraph 2 of said Order granting the Motion of defendants to stay the instant action pending the final determination of the issues raised by Declaratory Judgment in

the Venezuelan Action, or until further Order of this Court.

Dated: June 11, 1979

Connolly, Bove & Lodge

By /s/ THOMAS S. LODGE
Farmers Bank Building
Wilmington, Delaware 19899
Attorneys for Plaintiff

OF COUNSEL:

George W. Renaudin, Esq.
Royston, Rayzor, Cook & Wickery
3710 One Shell Plaza
Houston, Texas 77002

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1947

LEEWARD PETROLEUM, LTD.,
a Bermuda corporation,
Appellant,

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL CORPORATION,
a Pennsylvania corporation,
Appellees.

APPELLEES' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant-Appellees, Mene Grande Oil Company and Gulf Oil Corporation, hereby respectfully move this Court for an Order dismissing the appeal of plaintiff-appellant, Leeward Petroleum, Ltd. to this Court from an Order of the United States District Court for the District of Delaware, entered May 15, 1979.

The ground upon which this Motion is based is that this Court does not have subject matter jurisdiction under 28 U.S.C. § 1292(a)(1) over an appeal from an interlocutory order of the District Court: (a) staying proceedings before it in favor of a declaratory judgment action in the courts of Venezuela; and (b) refusing to

enjoin the prosecution of the declaratory judgment action in Venezuela. Support for this Motion is found in appellees' answering brief filed September 6, 1979, at pages 11 et. seq.

WHEREFORE, appellees respectfully move this Court to dismiss the appeal herein for lack of subject matter jurisdiction, the costs to be awarded to appellees.

Respectfully submitted,

/s/ E. NORMAN VEASEY
E. Norman Veasey
Allen M. Terrell, Jr.
David B. Stratton
Richards, Layton & Finger
4072 DuPont Building
P. O. Box 551
Wilmington, Delaware 19899
Attorneys for Defendant-
Appellees, Mene Grande Oil
Company and Gulf Oil
Corporation

OF COUNSEL:

Kevin F. Cunningham
The Law Department
The Gulf Companies
P. O. Box 3725
Houston, Texas 77001

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 1979, that true and correct copies of the within Appellees' Motion to Dismiss for Lack of Subject Matter Jurisdiction were personally delivered to:

Thomas S. Lodge, Esquire
Connolly, Bove & Lodge
1800 Farmers Bank Building
Wilmington, Delaware 19899
Counsel for Appellant,
Leeward Petroleum, Ltd.

/s/ E. NORMAN VEASEY
E. Norman Veasey

Dated: September 6, 1979

APPENDIX G

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
For The Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia 19106

THOMAS F. QUINN
Clerk

Telephone
215-597-2995

November 6, 1979

Mr. William S. Anderson, Jr.
Clerk, U. S. District Court
Box 18 Federal Building
Wilmington, Delaware 19801

Re: Leeward Petroleum, Limited vs. Mene Grande Oil Company, et al.; Leeward Petroleum Limited, etc., Appellant — No. 79-1947
(D.C. Civil No. 75-0245)

Dear Sir:

Enclosed herewith is a certified copy of order in the above-entitled case(s). This certified order is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

We return herewith the record in this case and will appreciate your signing the enclosed list(s) as a receipt for same.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified order is also enclosed showing costs taxed, if any.

Very truly yours,

/s/ THOMAS F. QUINN
Clerk

lmp
Enclosure

cc: Thomas S. Lodge, Esq.
(E. Norman Veasey, Esq.
(Allen M. Terrell, Jr., Esq.

THIRD CIRCUIT

October 5, 1979

No. 79-1947

LEEWARD PETROLEUM, LIMITED

v.

MENE GRANDE OIL COMPANY
and
GULF OIL CORPORATION

LEEWARD PETROLEUM LIMITED, a Bermuda corporation, Appellant

(D. C. Civil No. 75-0245)

Present: GIBBONS and HIGGINBOTHAM, *Circuit Judges.*

1. Appellees' motion to dismiss appeal for lack of jurisdiction, the costs to be awarded to appellees,
2. Copy of brief for appellees, sent by the undersigned for the Court's information,

in the above listed for Monday, October 15, 1979, or as the Court decides.

Respectfully,

/s/ T. L. QUINN
Clerk

ald
enc.

The foregoing Motion is granted.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Costs taxed in favor of appellees as follows:

Brief $1,810.09

Dated: October 15, 1979

Certified as a true copy and issued in lieu of a formal mandate on November 6, 1979.

Test: /s/ THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit